TRANSITIONAL JUSTICE AND REPARATIONS:
A Legal Perspective on Remedies in Transitioning Societies

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Acronyms

- *ARPA:* Administrative Reparations-Programmes approach
- *ATCA:* Alien Torts Claims Act
- *COA:* Court- Order Approach
- *FSIA*: Foreign Sovereign Immunities Act
- *ICC:* International Criminal Court
- *ICTR:* International Criminal Tribunal for Rwanda
- *ICTY:* International Criminal Tribunal for Yugoslavia
- *NGOs:* Non-Governmental Organisations

Glossary of Terms

- *Cap:* Chapter
- *Ibid:* As cited immediately above
- *Inter alia:* Among others (things)
- *Inter alios:* Among other persons
- *Mens rea:* Blameworthy (culpable) intent (mind)
- *Op cit:* As already cited somewhere in the text
- *Plethora of Authority:* Abundance of Existing Authorities
- *Stricto sensu:* Strictly speaking

1.0 Introduction

Any transitional society is likely to face the challenge of retributions for its citizenry that had fallen victim to grave violations of human rights perpetrated by the successive regime(s). There is general agreement that the challenge today lies in ensuring respect for basic human rights and laws through various mechanisms such as reparations. The definition of reparations is contested at best; at worst, it is murky or esoteric.[1] However, working definitions exist in both statutory law and case law.

For example, *Article 75 of the International Criminal Court Statute* (hereinafter referred to as the "ICC Rome Statue") states thus: *"The Court shall establish principles relating to reparations…including restitution, compensation, and rehabilitation."* The Permanent Court of International Justice implicitly defined reparations, in the *Chorzów Factory* case, when it ruled that *'reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed.'*[2] From the victims' standpoint reparations occupy a special place in a transition to democracy in that it acknowledges their plight, gives them back their dignity, ease their economic burden and assures them of non- repetition of these abuses.[3]

2.0 Main Text

This paper aims at critically evaluating "reparations" as one of the accountability mechanisms available to transitional societies. The paper incorporates, *inter alia*, an appreciation of the genesis and development of this right; the present status of this right under international law; the question of its enforceability; and other issues pertinent to the implementation of reparations at the domestic level.

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[1] M. Bradley, *FMO Research Guide: Reparations, Reconciliation and Forced Migration* (2009) ICTJ, New York, p 2.

[2] *Claim for Indemnity case, (Germany* v. *Poland), (Merits)*, PCIJ (Ser. A) No. 17, 1928, p. 29.

[3] P. de Greiff, *The Role of Reparations in Transition to Democracy* (2004) ICTJ, New York, p 1. Pablo de Greiff served as Advisor to the Peruvian Truth and Reconciliation Commission on its Reparations Recommendations.

2.1 Historical Developments of Reparations

Reparations date back to ancient times, especially in cases of transition from authoritarian regimes to democratic governance though they were pragmatically treated as simply philosophical theories.[4] This was largely due to the historical notion that individuals could not be recognised as subjects of international law, hence, unable to access legal redress such as reparation for state-sponsored abuses. The individual's right to reparations evolved out of the post- Second World War human rights regime, which firmly established the individual as a bearer of rights and duties under international law. West Germany's efforts to compensate Holocaust survivors in 1952 were the first example of a large-scale, modern reparations programme.[5]

Historically, after 1952 the fledgling reparations movement largely stagnated until the last two decades of the twentieth century. Since then, with the evolution of international human rights law and the international community's quest to circumvent recurrence of the atrocities committed during the period, reparative efforts have acquired a great deal of attention. These efforts have now been promoted due to the proliferation of processes defined as 'transitional justice'[6] and over the years, the development of reparations has taken diverse mechanism as evidenced in the establishment of the *1983 UN Trust Fund for Victims of Torture*[7] and now the *ICC's Trust Fund for Victims.*[8]

The 1990s brought about an era of accountability for former government officials and heads of state who had committed human rights violations and other abuses of power while in office against their own populations.[9] Since then, at least 69 former heads of state have been formally prosecuted for serious human rights violations and or economic crimes committed during their

[4] A. Casas and H. Germain (eds.), *The Reparations Game: An Analytical Framework of Reparations in Transitional Justice* (January 2008) Papel Político Journal, Vol. 13 No 1, Bogotá, p 197.

[5] E. Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2001) Johns Hopkins University Press, Washington D.C., p. 32.

[6] P. de Greiff, *Repairing the Past: Compensation for Human Rights Violations* (2006) ICTJ, New York, pp 451-477

[7] P. de Greiff and M. Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints* (2004) ICTJ, New York, p 237.

[8] ICC Rome Statute, Article 79.

[9] C. Reiger and E. Lutz, *Prosecuting Heads of State* (2009) ICTJ, New York, p 1.

administration with reparations ordered for victims in some instances.[10] This era was historically a landmark in that it coincided with the massive filing of class action suits in the American courts against three prominent Swiss banks under the *1789 Alien Torts Claims Act (ATCA)* for their complicity in the Holocaust.[11] As such, it rekindled and reinvigorated renewed interest in the quest of repairing historical injustices which had stalled after 1952. This led to the launch of several complex issues of reparations in transitional states onto political agendas worldwide.[12]

Debates in this line were held at various international forums including the *World Conference against Racism*. By the late 1990s a 'global frenzy to establish reparations as a right' was brewing in courtrooms, NGO offices, legislatures and newsrooms. This was supported by the establishment of internationally-supported tribunals and claims commissions through which the victims of human rights violations could pursue their claims. [13] However, these developments have been problematic. For example, between the second half of the twentieth century and the first decade of the twenty first, transitional societies around the world experienced the difficulty of satisfying simultaneously individual and collective needs of individuals, and overall, the constant tension between the provision of peace and justice.[14]

Therefore, the right to reparations was buttressed in the late 1980s and early 1990s with the emergence of the democratic dispensation as a response to political changes in Latin America, Eastern Europe and African countries moving from repressive regimes to democracy.[15] Prior to this, the right to reparations was looked at solely from the standpoint of international humanitarian law and not human rights violations by oppressive governments against their own citizenry. To date, this right has continued to develop taking established forms such as monetary compensation as in the case of El Salvador

[10] *Ibid.*
[11] Holocaust Victim Assets Litigation-Swiss Banks Claims available at http://www.swissbankclaims.com/.
[12] M. J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective* (2002), Berkeley Journal of International Law, London, p 20.
[13] *Holocaust Victim Assets Litigation-Claims Resolution Tribunal*, http://www.crt-ii.org
[14] A. Casas and H. German (eds.), *supra,* footnote 4.
[15] P. de Greiff (ed.), *What is Transitional Justice?* (December, 2008) ICTJ, New York, p 1.

and guarantees of non-repetition.[16] Another notable form is restitution as in the *Jewish Holocaust survivors' case* where the Swiss Banks reached a settlement of US$ 1.25 Billion in 1998 as return of looted money and in *lieu* of chattel exploited from the holocaust victims.[17] Others include satisfaction and moral reparations such as truth revelation in the case of South Africa [18] and rehabilitation as in the case of Bosnia and Herzegovina where victims demanded free access to medical and psychological care.[19]

2.2 The Status Quo of Reparations Under International Law

As espoused by *Priscilla Hayner,* [20] under international law the right to reparations is well established only for certain perpetrations bordering on human rights violations such as unlawful detention[21] *inter alia.*Otherwise, the right to reparations is generally inferred from the victim's right to an effective remedy as per *Article 2(3) of the International Convention on Civil and Political Rights.* Further, according to *Article 1 of the International Law Commission's 2001 Articles* [22]*,* it is a general principle of public international law that any wrongful act that violates an obligation under international law gives rise to an obligation to make reparations as enunciated in the *Chorzów Factory case.*[23]

As the field of transitional justice expands, reparative remedies have begun to gain an important foundation in international law.[24] This is evident from the 1988 decision of the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez v. Honduras*, in which the Court found that all states have four fundamental obligations in the area of human rights. One of these

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[16]C. Tomuschat et al (eds.), *State Responsibility and the Individual: Reparation in Instances of Grave Human Rights Violations* (1999) p. 4.

[17]A. Goodman and J. Gonzalez (eds.), *Democracy Now: Process Begins for Distributing Holocaust Reparations* (1st December, 1998) DN War and Peace Report, New York, p 1.

[18] Klaaren and Varney, *'A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues Around Legislation for a Second Amnesty'* (2000) 117 South African Law Journal, p 12.

[19]S. Bagshaw, *Benchmarks or Deutschmarks? Determining the Criteria for the Repatriation of Refugees to Bosnia and Herzegovina* (1997), *IJRL* 9 (4) Zurich, pp 566-592.

[20] P. B. *Hayner, Unspeakable Truths* (2002), Chapter 11.

[21] Article 9(5), ICCPR

[22] UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001.

[23] Supra, footnote 2.

[24] *Ibid,* p 3

fundamental obligations, the Court held, is to ensure reparations for the victims of the violations.[25] These principles have been explicitly affirmed by later decisions by the court and endorsed in decisions by the European Court of Human Rights and by UN treaty body decisions such as the Human Rights Committee.[26] The *ICC Rome Statute* also enshrines this obligation.[27]

Although *The Hague Convention*[28] and *Additional Protocol (I)* speak only of compensation, reparations encompasses compensation as listed in the *UN Draft of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.*[29] By analogy, reparations is, therefore, covered by the *Hague Convention.* Another important international instrument on reparatory measures is the *UN Draft Principles on Housing and Property Restitution for Refugees and Internally Displaced Persons* which has already served as a valuable new tool to guide the reparation programmes in Kosovo, Tajikistan, Guatemala and East Timor under the auspices of the *Dayton Agreement.*[30] The controversial *Dayton Agreement*[31] did set a new standard in international law by incorporating reparations into peace agreements by including provisions on cooperation with the ICTY, and establishing mechanisms to provide housing and property reparations to those displaced in the transitional phase.

2 .3 Enforcing Reparations

In transitional societies there are two main mechanisms of enforcing reparations whether at national or international level. On the one hand we have Court- Order approach (COA) and on the other hand we have Administrative Reparations-Programmes approach (ARPA). COA entails the

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[25] *Velázquez Rodriguez*, Inter-American Court of Human Rights, judgment of 29 July 1988, Series C No. 4.

[26] *Ibid.*

[27] Article75.

[28] 1907. See also the UN Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), Geneva.

[29] UN Doc. E/CN.4/2000/62, 18 January 2001.

[30] D. Fitzpatrick, *Land Issues in a Newly Independent East Timor, Canberra: Australian Department of the Parliamentary Library Information and Research Services*(2001) Research Paper No. 21 2000-01 available at http://www.aph.gov.au/library/pubs/rp/2000-01/01RP21.pdf

[31] *General Framework Agreement for Peace in Bosnia and Herzegovina, 1995.*

victim(s) commencing court proceedings in which they claim reparations. Here the right to reparations only actuates after the Court has found for the plaintiffs (victims) and make an order for reparations. Examples include the South African Apartheid cases instituted under the *ATCA.*[32] On the other hand, ARPA does not necessary involve legal proceedings.

This approach is very common in instances where Truth Commissions have been constituted, and it is usually the Commission itself that will stipulate reparations as part of the solution package to repairing the past. Examples include the payment of pensions to the families of those who were killed or forced to disappear under Pinochet's regime in Chile and the reparations for apartheid victims paid from the President's fund in South Africa.

Institutions of enforcement include national and international courts. Under national courts, we have national courts of the State of commission and National courts of third States. Suing a State for damages before the courts of a third States would often fail due to State immunity. However, in some States, the responsible individuals can be sued, even if neither party has any connection to that State. Certain civil law States such as Germany provide for "civil universal jurisdiction" if the claim is brought as *action civile* in a criminal trial based on universal jurisdiction.[33] Equally, in the USA, civil universal jurisdiction is possible under the *ATCA* but independent of criminal proceedings for claims in human rights violation cases.[34]

At the international level there is the International Criminal Court[35] and the Permanent International Court of Justice. At regional level, there are courts including the Inter-American Court of Human Rights,[36] the European Court of Human Rights and the African Court of Human Rights. Others include

[32]U.S. District Court S.D.N.Y.: *In Re South African Apartheid Litigation*, Judgment of 29 November 2004 (02 MDL 1499 (SAS)).

[33]L. Fernandez/ G. Werle, Reparations (2009) *Lecture Reader Materials for the LLM Programme,* Cape Town, available with the author.

[34] *Filártiga v Peña-Irala,*630 F.2d 876 (2d Cir.1980)

[35] *cf.* Arts. 75, 79 ICC Statute

[36] La *Rochela Massacre v Colombia,* IAC Judgement of 11 May 2007.

specially mandated bodies such as the ICTY and the ICTR, and ad hoc claims commissions such as the United Nations Compensation Commission.[37]

2.4 Pertinent Issues of Implementation at Domestic Level

Many countries possess robust domestic laws on human rights and reparations, or have integrated international legal standards on these issues into national law. However, using national laws to secure redress is a complex process that is often inaccessible to marginalised victims due to various issues as below:

Firstly, most new Governments would object to individual suits for reparation on the basis that the victims' rights have since become statute barred. For example, in the case of *Arce v. Garcia*[38] the Government of El Salvador raised this preliminary objection. However, on 4 January 2006, a United States appellate court upheld a district court decision to equitably toll the statute of limitations on the plaintiff's claim until the end of the civil war in El Salvador. Plaintiffs, Salvadoran refugees, claimed they had been tortured by soldiers in El Salvador during the course of a campaign of human-rights violations.

Secondly, some new Governments are unwilling to make reparations arguing that the perpetrators had immunity by virtue of their official capacity at the time of the perpetrations. This issue was raised in the Nigerian case of *Enahoro v. Abubakar.*[39] However, on 23 March 2006, a United States appellate court held that the defendant was not immune from suit under the Foreign Sovereign Immunities Act (FSIA), as the Act applies only to foreign states and their agencies, not to individual members of government. The plaintiffs had alleged that the defendant, as a member of the military junta that had ruled Nigeria from 1993-1999, was responsible for torture and killing. The appellate court remanded the case for further proceedings.

Thirdly, certain new Government would oppose the victims' claim for reparations on the basis that they were not adequately identified as the victims

[37] D. Caron, and B. Morris, *'The United Nations Compensation Commission: Practical Justice, not Retribution'* (2002) vol. 13 European Journal of International Law, London, p 1.
[38] 434 F.3d 1254
[39] 408 F.3d 877

hence lack sufficient *locus standii* to claim. In extreme cases, even national security is argued as a valid factor in consolidating the issue of locus standii as in the case of *Arar v. Ashcroft.*[40] On 16 February 2006, a United States district court dismissed plaintiff's claim, arguing that the plaintiff lacked standing, and citing national security concerns. The plaintiff had claimed he was tortured first in American, and then in Syrian custody, where he had been transferred under the United States' "extraordinary rendition" programme.

Fourthly, harmonization of domestic reparation programmes with international law standards becomes an issue. For example, the fall of the *Fujimori* regime in November 2000 brought new possibilities for a shift towards respect for human rights in Peru and the development of a different national consciousness about the abuses of the preceding twenty years. The domestic proposal for arbitrary reparations to some victims was considered a mockery by the international community.[41] This international pressure brought about the biggest advance in late July 2005, when the Peruvian Congress was prompted to pass the Law Creating the Comprehensive Reparations Plan consistent with international law.[42] The list is long; suffice to mention the above due to the scope of the paper.

3.0 Conclusion

From the foregoing, and indeed on a *plethora* of authorities, it is clear that the idea of compensation in proportion to harm raises insurmountable problems. Hence, there is need to reconceptualise fairness in terms of how reparations serve to promote the goals of recognizing victims, promoting civic trust, and fostering social solidarity. While in each individual case reparations can only address the consequences of a violation, at a more general level a body of law is strengthened if a breach thereof gives rise to an entitlement to reparation. This is the role of reparations in deterring possible future recurrences of large-scale human rights violations.

[40] 414 F.Supp.2d 250

[41] J. Guillerot and L. Magarrell, *Peru and Reparations: Little Practical Progress on the Ground* (August 2006) ICTJ, New York, p 234.

[42] Reparations Law No. 28592, 29 July 2005.

BIBLIOGRAPHY

(A) PRIMARY SOURCES

Table of Cases Cited

1. Arar v. Ashcroft, 414 F.Supp.2d 250
2. Arce v. Garcia 434 F.3d 1254.
3. Azapo & Others v President of the Republic of South Africa , 1996(4) SA 671 (CC)
4. Chorzów Factory, Permanent Court of International Justice, Claim for Indemnity case, (Germany v. Poland), (Merits), PCIJ (Ser. A) No. 17, 1928.
5. Enahoro v. Abubakar, 408 F.3d 877
6. Filártiga v Peña-Irala,630 F.2d 876 (2d Cir.1980)
7. Holocaust Victim Assets Litigation-Claims Resolution Tribunal, http://www.crt-ii.org
8. Jewish Holocaust survivors' case.
9. La Rochela Massacre v Colombia, IAC Judgement of 11 May 2007.
10. Velásquez Rodríguez v. Honduras, Inter-American Court of Human Rights, judgment of 29 July 1988, Series C, No. 4.
11. U.S. District Court S.D.N.Y.: In Re South African Apartheid Litigation, Judgment of 29 November 2004 (02 MDL 1499 (SAS)).

List of Agreements, Covenants and Protocols

1. Additional Protocol (I) to the Hague Convention.
2. Dayton Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina, 1995.
3. International Covenant on Civil and Political Rights.

List of Conventions

1. Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), Geneva.
2. Hague Convention.

List of Trust Funds and Compensation Commissions

1. ICC's Trust Fund for Victims.

2. South Africa's President Fund.
3. UN Compensation Commission.
4. UN Trust Fund for Victims of Torture, 1983.

List of UN Resolutions and Draft Documents

1. UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001, International Law Commission's 2001 Articles
2. UN Doc. E/CN.4/2000/62, 18 January 2001, Draft of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.
3. Draft Principles on Housing and Property Restitution for Refugees and Internally Displaced Persons

List of International Statute

1. International Criminal Court, Rome Statute

List of National Statutes

1. Peru:

- Reparations Law No. 28592, 29 July 2005.

2. USA:

- The Alien Torts Claims Act of 1789.
- Foreign Sovereign Immunities Act USA's FSIA

(B)SECONDARY SOURCES

List of Books & Journals Consulted

1. A. Casas and H. Germain (eds.) *The Reparations Game: An Analytical Framework of Reparations in Transitional Justice* (January 2008) Papel Político Journal, Vol. 13 No 1, Bogotá.
2. A. Goodman and J. Gonzalez (eds.), *Democracy Now: Process Begins for Distributing Holocaust Reparations* (1st December, 1998) DN War and Peace Report, New York.
3. C. Reiger and E. Lutz, *Prosecuting Heads of State* (2009) *ICTJ,* New York.

4. C. Tomuschat *et al* (eds.), *State Responsibility and the Individual: Reparation in Instances of Grave Human Rights Violations* (1999).
5. D. Caron, and B. Morris, "The United Nations Compensation Commission: Practical Justice, not Retribution" (2002) vol. 13 *European Journal of International Law,* London.
6. E. Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2001) Johns Hopkins University Press, Washington D.C.
7. J. Guillerot and L. Magarrell, *Peru and Reparations: Little Practical Progress on the Ground* (August 2006) *ICTJ*, New York.
8. Klaaren and Varney, *'A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues around Legislation for a Second Amnesty'* (2000) 117 South African Law Journal.
9. M. Bradley, *FMO Research Guide: Reparations, Reconciliation and Forced Migration* (2009) *ICTJ*, New York.
10. M. J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective* (2002), Berkeley Journal of International Law, London.
11. P. B. Hayner, *Unspeakable Truths* (2002), Chapter 11.
12. P. de Greiff and M. Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints* (2004) *ICTJ*, New York.
13. P. de Greiff, *Repairing the Past: Compensation for Human Rights Violations* (2006) *ICTJ*, New York.
14. P. de Greiff, *The Role of Reparations in Transition to Democracy* (2004) *ICTJ*, New York.
15. P. de Greiff (ed.), *What is Transitional Justice?* (December, 2008) *ICTJ*, New York.
16. S. Bagshaw, *Benchmarks or Deutschmarks? Determining the Criteria for the Repatriation of Refugees to Bosnia and Herzegovina* (1997), *IJRL* 9 (4) Zurich.

Seminars, Workshops and Presentations

1. D. Fitzpatrick, "Land Issues in a Newly Independent East Timor, Canberra: Australian Department of the Parliamentary Library Information and Research Services" (2001) *Research Paper No. 21 2000-01* available at http://www.aph.gov.au/library/pubs/rp/2000-01/01RP21.pdf

2. L. Fernandez & G. Werle, "Reparations" (2009) *Lecture Reader Materials for the LLM Programme,* Cape Town, available with the author.

Websites

1. *http://www.swissbankclaims.com/,* Holocaust Victim Assets Litigation-Swiss Banks Claims.
2. *http://www.crt-ii.org,* Holocaust Victim Assets Litigation-Claims Resolution Tribunal.